

Mar 21, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID BRUCE C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. 2:18-cv-00083-RHW

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND REMAND
FOR FURTHER PROCEEDINGS**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 12, and Defendant's Cross-Motion for Summary Judgment, ECF No. 13. The motions were heard without oral argument. Plaintiff is represented by Jeffrey Schwab; Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney Summer Stinson.

For the reasons set forth below, the Court **grants** Plaintiff's motion, **denies** Defendant's motion, and **remands** this action to the Commissioner.

Jurisdiction

On December 24, 2013, Plaintiff filed a Title XVI application for supplemental security income. Plaintiff alleged an onset date of April 1, 2013.¹

¹ The Appeals Council noted that the alleged onset date was before the denial of Plaintiff's prior application. The Appeals Council agreed with the ALJ's decision to not reopen the application period. Consequently, the alleged onset date was adjusted to August 31, 2016. AR 5.

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1 Plaintiff's application was denied initially and on reconsideration. On
2 March 2, 2016, Plaintiff appeared and testified at a hearing held in Wenatchee,
3 Washington before an ALJ. Kim Mullinax participated as a vocational expert, as
4 well as Dr. Nancy Winfrey, clinical psychologist and Dr. Arthur Lorber, M.D.
5 Plaintiff was represented by Jeffrey Schwab.

6 The ALJ issued a decision on May 9, 2016, finding that Plaintiff was not
7 disabled. Plaintiff timely requested review by the Appeals Council, which issued a
8 decision on January 11, 2018, finding that Plaintiff was not disabled.

9 Plaintiff filed an appeal with the United States District Court for the Eastern
10 District of Washington on March 6, 2018. ECF No. 3. The matter is before this
11 Court under 42 U.S.C. § 405(g).

12 **Sequential Evaluation Process**

13 The Social Security Act defines disability as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than twelve months."

17 42 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a
18 disability only if her impairments are of such severity that the claimant is not only
19 unable to do his previous work, but cannot, considering claimant's age, education,
20 and work experiences, engage in any other substantial gainful work which exists
21 in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*
24 *Yuckert*, 482 U.S. 137, 140-42 (1987).

25 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
26 § 416.920(b). Substantial gainful activity is work done for pay and requires
27 compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894 F.2d 1053,
28 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity, benefits are

1 denied. 20 C.F.R. § 416.920(b). If he is not, the ALJ proceeds to step two.

2 Step 2: Does the claimant have a medically-severe impairment or
3 combination of impairments? 20 C.F.R. § 416.920(c). If the claimant does not
4 have a severe impairment or combination of impairments, the disability claim is
5 denied. A severe impairment is one that lasted or must be expected to last for at
6 least 12 months and must be proven through objective medical evidence. 20 C.F.R.
7 § 416.909. If the impairment is severe, the evaluation proceeds to the third step.

8 Step 3: Does the claimant's impairment meet or equal one of the listed
9 impairments acknowledged by the Commissioner to be so severe as to preclude
10 substantial gainful activity? 20 C.F.R. § 416.920(d); 20 C.F.R. § 404 Subpt. P.
11 App. 1. If the impairment meets or equals one of the listed impairments, the
12 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
13 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

14 Before considering Step 4, the ALJ must first determine the claimant's
15 residual functional capacity. 20 C.F.R. § 416.920(e). An individual's residual
16 functional capacity is his ability to do physical and mental work activities on a
17 sustained basis despite limitations from his impairments.

18 Step 4: Does the impairment prevent the claimant from performing work he
19 has performed in the past? 20 C.F.R. § 416.920(f). If the claimant is able to
20 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform
21 this work, the evaluation proceeds to the fifth and final step.

22 Step 5: Is the claimant able to perform other work in the national economy
23 in view of his age, education, and work experience? 20 C.F.R. § 416.920(g).

24 The initial burden of proof rests upon the claimant to establish a prima facie
25 case of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098
26 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
27 mental impairment prevents him from engaging in his previous occupation. *Id.* At
28 step five, the burden shifts to the Commissioner to show that the claimant can

1 perform other substantial gainful activity. *Id.*

2 **Standard of Review**

3 The Commissioner's determination will be set aside only when the ALJ's
4 findings are based on legal error or are not supported by substantial evidence in
5 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
6 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
7 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
8 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
9 evidence is "such relevant evidence as a reasonable mind might accept as adequate
10 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
11 ALJ's denial of benefits if the evidence is susceptible to more than one rational
12 interpretation, one of which supports the decision of the administrative law judge.
13 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the
14 entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence
15 can support either outcome, the court may not substitute its judgment for that of
16 the ALJ." *Matney*, 981 F.2d at 1019.

17 A decision supported by substantial evidence will be set aside if the proper
18 legal standards were not applied in weighing the evidence and making the decision.
19 *Browner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
20 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the
21 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
22 1050, 1055 (9th Cir. 2006).

23 **Statement of Facts**

24 The facts have been presented in the administrative transcript, the ALJ's
25 decision, and the briefs to this Court; only the most relevant facts are summarized
26 here. At the time of the hearing, Plaintiff was 38 years old. He has a 10-grade
27 education. He reported that he was working on his GED. Plaintiff does not live on
28 his own. Rather, he lives with friends and family and at times has been homeless.

1 He has borderline intellectual functioning (IQ 71). He previously worked as
2 a cashier, in fast food, in roofing, as a janitor, as a lumber sorter, as a short order
3 cook and as a stock clerk.

4 He has experienced two seizures, has chronic back pain and daily heartburn.
5 He has numerous visits to the ER and/or doctors demonstrating back spasms. He
6 complains of lower leg pain and weakness. An MRI revealed congenital
7 deformities, but there was no acute disc herniation or severe nerve impingement.

8 At the time of the hearing, he was on medication for acid reflux and asthma
9 and takes a muscle relaxer and Vicodin for pain. He also has a medical marijuana
10 license and smokes it daily.

11 **The Appeals Council/ALJ's Findings**

12 The Appeals Council adopted the ALJ's statements regarding the pertinent
13 provisions of the Social Security Act, regulations, Social Security Rulings and
14 Acquiescence Rulings, the issues of the case and the evidentiary facts, as
15 applicable. AR 4. It also adopted the ALJ's findings or conclusions regarding
16 whether Plaintiff was disabled. AR 4. It agreed with the ALJ's findings under
17 steps 1, 2, 3, 4, and 5. AR 4. The Appeals Council concluded that Plaintiff had
18 successfully rebutted the presumption of non-disability that was initially present as
19 a result the denial of his previous application. AR 5.

20 At step one, the ALJ found that Plaintiff has not engaged in substantial
21 gainful activity since December 24, 2013, the application date. AR 26.

22 At step two, the ALJ found Plaintiff has the following severe impairments:
23 obesity, lumbar degenerative disk disease, major depressive disorder, borderline
24 intellectual functioning, neurocognitive disorder, cannabis dependence. AR 26.

25 At step three, the ALJ found that Plaintiff's impairments or combination of
26 impairments do not meet or medically equal any Listing. AR 58. Specifically, the
27 ALJ considered Listings 1.02 (Major Dysfunctions of the Joint); 1.04 (Disorders
28 of the Spine); 11.02 and 11.03 (Epilepsy); 3.03 (Asthma); 12.02 (Neurocognitive

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1 Disorders), 12.04 (Depressive, Bipolar and Related Disorders), 12.05 (Intellectual
2 Disorders) and 12.09. AR 27-28.

3 The ALJ concluded that Plaintiff has the residual functional capacity to
4 perform:

5 light work as defined in 20 C.F.R. 416.967(b). The claimant can
6 occasionally lift and carry up to 20 pounds and frequently lift and
7 carry up to 10 pounds. He can sit for at least 6 hours in an 8-hour day,
8 and stand and walk for at least 4 hours in an 8-hour workday in, at
9 most, 1-hour intervals (if someone is standing for one hour they need
10 to sit for a period of time (15 minutes) and vice versa). The claimant
11 can occasionally perform foot control operation with both feet. He
12 should never climb ladders, ropes, scaffolds, kneel, crouch, or crawl.
13 The claimant can occasionally climb ramps and stairs, and stoop. The
14 claimant should avoid all exposure to hazards (such as moving
15 machinery and unprotected heights) and extreme cold, vibration, and
16 pulmonary irritants such as fumes, dusts, gasses, chemicals, and
17 poorly ventilated areas (worse air quality than an office setting). The
18 claimant is limited to simple, routine tasks with only occasional
19 changes in the work setting, and work with no production, rate, or
20 pace requirements. He can perform jobs with a General Education
21 Development level of 3.

22 AR 29.

23 The Appeals Council agreed with this residual capacity assessment except
24 to note that it did not agree with the limitation regarding general education
25 development level. AR 6.

26 At step four, the ALJ found that Plaintiff was unable to perform any past
27 relevant work. AR 34.

28 Because Plaintiff's ability to perform all or substantially all the
requirements of medium work has been impeded by additional limitations, the ALJ
asked the vocational expert whether jobs existed in the national economy for an
individual with Plaintiff's age, education, work experience, and residual functional
capacity. The vocational expert identified the following representative occupations:
(1) storage facility rental clerk; and (2) furniture rental consultant. AR 35.

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Issues for Review

1. *Whether the ALJ properly found that Plaintiff does not meet Listing 1.04A.*
2. *Whether the ALJ properly reviewed the medical opinions.*
3. *Whether the ALJ properly conducted an adequate analysis at Step Five.*

Analysis

1. *Whether the ALJ properly found that Plaintiff does not meet Listing 1.04A*

Plaintiff argues the ALJ erred in not finding that he meets Listing 1.04A.

Listing 1.04 provides:

1.04. Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);

The ALJ concluded that Plaintiff's degenerative disc disease did not meet or medically equal the severity of listing 1.04 because "there was no evidence of nerve root compression, limitation of motion of the spine, and motor loss (atrophy with associated muscle weakness or muscle weakness (accompanied by sensory or reflex loss and positive straight leg raising tests (sitting and supine)." AR 27.

Plaintiff asserts there is evidence in the record that meets the listing of 1.04A. The evidence cited by Plaintiff, however, does not provide the necessary support. Rather, while the MRI revealed that Plaintiff did have congenital deformities, there was no acute disc herniation and no severe nerve impingement. There is nothing in the record to suggest a compromise of the nerve root. Moreover, the MRI did not reveal any specific cause for Plaintiff's right leg pain. AR 365. Dr. Ward reviewed the MRI and recommended continued conservative

1 management. AR 412. While there are a few instances of positive straight leg tests,
2 the longitudinal review of the record reveals negative straight leg tests as well. In
3 November, 2014, Plaintiff did not describe any leg numbness or weakness to Dr.
4 Dregnuis. AR 445.

5 The ALJ's conclusion that Plaintiff did not meet the Listing 1.04A is
6 supported by substantial evidence.

7 2. *Whether the ALJ properly reviewed the medical opinions*

8 Plaintiff argues the ALJ erred in rejecting or failing to consider the
9 opinions of examining physician, Dr. MacLennan, medical expert Dr. Winfrey,
10 and treating physician's assistant Shellie A. Robidou.

11 1. **Dr. Catherine MacLennan, PhD**

12 Dr. Catherine MacLennan performed a psychological evaluation on Plaintiff.
13 AR 454. She reported that he arrived early, but his general appearance was
14 disheveled. He was tangential, hyperv verbal and often difficult to understand. She
15 had to ask him to repeat himself several times. There was no indication of
16 malingering or factitious behavior.

17 Dr. MacLennan conducted a battery of psychological tests. Based on these
18 tests, Dr. MacLennan concluded that Plaintiff "appeared to have cognitive
19 limitations that would impact his functional abilities in relation to full time work
20 and independent living." AR 466. Specifically, he has limited abilities with
21 reasoning, limited judgment, but adequate impulse control, and lacks insight into
22 his own condition.

23 She noted that Plaintiff has difficulty answering simple questions and would
24 have difficulty with following and participating in a conversation beyond a
25 concrete level. He has limited ability to understand and comprehend what is said
26 to him and has difficulty with sustained concentration, pace and persistence,
27 although he could sustain focused attention long enough to ensure the timely
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1 completion of simple and repetitive daily tasks at home or at work. He failed to
2 demonstrate that he had the ability to handle money.

3 The ALJ granted Dr. MacLennan's opinion great weight. Presumably, the
4 ALJ incorporated her opinion into the RFC by limiting the work performed by
5 Plaintiff to simple, routine tasks with only occasional changes in the work setting,
6 and work with no production, rate, or pace requirements. However, the ALJ failed
7 to incorporate the limitations identified by Dr. MacLennan with respect to
8 Plaintiff's difficulty with communication, *i.e.* difficulty answering simple
9 questions, difficulty with following and participating in a conversation beyond a
10 concrete level, and limited ability to understand and comprehend what is said to
11 him.

12 The ALJ erred when formulating Plaintiff's RFC because the RFC neither
13 incorporated Dr. MacLennan's complete opinion of Plaintiff's work limitations
14 nor gave specific and legitimate reasons for rejecting it. *See Lester v. Chater*, 81
15 F.3d 821, 830–31 (9th Cir. 1996). As a result, the VE's testimony based on the
16 flawed RFC had no evidentiary value. *See Embrey v. Bowen*, 849 F.2d 418, 422–
17 23 (9th Cir. 1988). In evaluating Plaintiff's RFC on remand, the ALJ should
18 address Dr. MacLennan's opinion and specifically the limitations identified with
19 Plaintiff's communication skills.

20 **2. Dr. Nancy Winfrey, PhD**

21 Dr. Nancy Winfrey testified at the hearing before the ALJ. She noted that
22 Plaintiff had mild limitations in social functioning, and moderate limitations in
23 concentration, persistence and pace. AR 83. She concluded that Plaintiff should
24 not work where there would be production quotas. She noted that it was
25 reasonable to believe that Plaintiff would be off task a bit outside the normal range.
26 Upon questioning, she agreed that Plaintiff would be off task six to twelve minutes
27 an hour, up to approximately 20 percent. She concluded that Plaintiff should have
28 simple instructions only and no visual instruction that he would have to remember.

1 The ALJ granted Dr. Winfrey's opinion partial weight, discounting her
2 limitation to "no visual instruction" because it was vague, that is, it did not specify
3 what "visual instructions" were, *i.e.* pictures, live demonstration, written words, or
4 specifically what evidence supported it.

5 The ALJ has an independent "duty to fully and fairly develop the record and
6 to assure that the claimant's interests are considered." *Smolen v. Chater*, 80 F.3d
7 1273, 1288 (9th Cir. 1996). The ALJ may discharge this duty in several ways,
8 including: subpoenaing the claimant's physicians, submitting questions to the
9 claimant's physicians, continuing the hearing, or keeping the record open after the
10 hearing to allow supplementation of the record. *Tidwell v. Apfel*, 161 F.3d 599,
11 602 (9th Cir.1998).

12 The ALJ erred in discounting Dr. Winfrey's opinion because it was vague.
13 Notably, the ALJ failed to ask Dr. Winfrey to clarify or to substantiate her
14 testimony. Notably, she testified that she reviewed Dr. MacLennan's report and
15 relied on that report for her conclusions.

16 The ALJ erred when formulating Plaintiff's RFC because the RFC neither
17 incorporated Dr. Winfrey's complete opinion of Plaintiff's work limitations nor
18 gave specific and legitimate reasons for rejecting it. *Lester*, 81 F.3d at 830-31. As
19 a result, the VE's testimony based on the flawed RFC had no evidentiary value.
20 *Embrey*, 849 F.2d at 422-23. In evaluating Plaintiff's RFC on remand, the ALJ
21 should address Dr. Winfrey's opinion and specifically the limitations identified
22 regarding visual instructions and the amount of time Plaintiff is expected to be off
23 task.

24 3. Shellie A. Rabidou

25 Shellie A. Rabidou is a physician's assistant. She opined that Plaintiff has
26 marked limitations in sitting, standing, walking, lifting, carrying, pushing, and
27 pulling due to low back pain and radicular symptoms, and marked limitations in
28 communicating due to depression and post-concussion syndrome.

1 The ALJ gave Ms. Rabidou’s opinion little weight. The ALJ concluded that
2 her opinion was not consistent with the opinions of medical experts Drs. Winfrey
3 and Lorber, and is also inconsistent with subsequent records showing the
4 claimant with an activity level exceeding these findings (raking, snow shoveling,
5 basketball) or objective findings showing only slightly decreased lumbar range of
6 motion and no neurological deficits.

7 Physician’s assistants are defined as “other sources,” and are not entitled to
8 the same deference as treating or examining physicians. SSR 06–03p²; *Molina v*
9 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). The ALJ may discount testimony
10 from these “other sources” if the ALJ “‘gives reasons germane to each witness for
11 doing so.’” *See Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir.
12 2010) (quoting *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)).

13 Here, the ALJ failed to provide germane reasons for discounting Ms.
14 Rabidou’s opinions regarding Plaintiff’s communication difficulties. In
15 evaluating Plaintiff’s RFC on remand, the ALJ should address Ms. Rabidou’s
16 opinion regarding Plaintiff’s and specifically his limitations with regard to
17 communication.

18 3. *Whether the ALJ properly conducted an adequate analysis at Step Five*

19 The ALJ concluded that Plaintiff could perform GED level 3 jobs. The
20 Appeals Council rejected this finding because this is not included in the mental
21 requirements for work, citing to 20 C.F.R. § 416.945 and SSR 96-8p.

22 “The GED levels includes the reasoning ability required to perform the job,
23 ranging from Level 1 (which requires the least reasoning ability) to Level 6 (which
24 requires the most).” *Zavalin v. Colvin*, 778 F.3d 842, 843 (9th Cir. 2015). In
25 *Zavalin*, the Ninth Circuit recognized there is an apparent conflict between the
26 residual functional capacity to perform simple, repetitive tasks, and the demands

27 ² SSR 06–03p was rescinded by 82 Fed. Reg. 15263, but is applicable to claims
28 filed before March 27, 2017.

1 of Level 3 Reasoning.³ *Id.* It reasoned that a limitation to simple, routine tasks is at
2 odds with Level 3’s requirements because “it may be difficult for a person limited
3 to simple, repetitive tasks to follow instructions in ‘diagrammatic form’ as such
4 instructions can be abstract.” *Id.* (quotation omitted).

5 Because the testimony of the VE was in response to an incomplete and
6 possibly conflicted RFC, it has no value. In evaluating Plaintiff’s RFC on remand,
7 the ALJ should address the apparent conflict.

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22 ³ LEVEL 2

23 Apply commonsense understanding to carry out detailed but uninvolved written or
24 oral instructions. Deal with problems involving a few concrete variables in or from
standardized situations.

25 LEVEL 3

26 Apply commonsense understanding to carry out instructions furnished in written,
27 oral, or diagrammatic form. Deal with problems involving several concrete
variables in or from standardized situations.

28 *Zavalin*, 778 F.3d at 847.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

3 2. Defendant's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

4 3. The decision of the Commissioner denying benefits is **reversed**. This
5 matter is **remanded** to the Commissioner for proceedings consistent with this
6 Order.

7 4. The District Court Executive is directed to enter judgment in favor of
8 Plaintiff and against Defendant.

9 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
10 file this Order, provide copies to counsel, and close the file.

11 **DATED** this 21st day of March 2019.

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13 *s/Robert H. Whaley*
14 ROBERT H. WHALEY
15 Senior United States District Judge
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